

DEPARTMENT OF STATE REVENUE

Revenue Ruling #2014-11ST
January 15, 2016

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ISSUES

I. Adjusted Gross Income Tax - Nexus

Authority: [IC 6-3-2-2](#); [IC 6-3-2-2.2](#); [IC 6-3-2-2.8](#); [45 IAC 3.1-1-38](#); [45 IAC 3.1-1-55](#); [45 IAC 3.1-1-62](#); Income Tax Information Bulletin #12 (October 2015).

A company ("Taxpayer") is seeking a ruling regarding whether Taxpayer's sales would be considered income in Indiana because they maintain an office in Indiana.

II. Sales and Use Tax - Substantial Nexus

Authority: [IC 6-2.5-2-1](#); [IC 6-2.5-3-1](#); [IC 6-2.5-5-46](#); [45 IAC 2.2-3-3](#); Sales Tax Information Bulletin #37 (June 2007).

Taxpayer also seeks an opinion as to whether it is required to collect Indiana sales tax on the sale of airplane parts from its Texas location to Indiana businesses.

STATEMENT OF FACTS

Taxpayer provides the following relevant, factual context regarding its business operations:

[Taxpayer] is a Texas incorporated company that manufactures non critical airplane parts. The company has to submit an engineered drawing of each part they manufacture to the Federal Aviation Administration. This is called [Parts Manufacturer Approval ("PMA")]. . . . The FAA requires a company who submits PMA's to have an office in the location where they submit drawings. [Taxpayer] opened an office in Indianapolis . . . just so they could submit drawings to [the] Indiana office of the FAA. [Taxpayer] does have an employee who lives in Indiana. This employee will submit the drawings to the Indiana office of the FAA. [Taxpayer] will withhold state income tax from this employee and will pay quarterly unemployment taxes to the state. The sole purpose of this office is strictly to have an office from which to submit drawings to the FAA. [Taxpayer] will not sell parts from this office. There will be no income generated by this office. All manufacturing of parts will be in Texas. [Taxpayer] assume[s they] will be required to file an Indiana corporate income tax return.

[Taxpayer] may sell parts to Indiana customers. Their customers are commercial airline companies . . . The parts will be ordered by customers who contact the Fort Worth office and will be shipped from the Fort Worth office.

Additionally, Taxpayer will have other expenses in Indiana such as rent, salaries, payroll taxes, and telephones.

DISCUSSION

In general, [IC 6-3-2-2\(a\)](#) defines adjusted gross income from sources within Indiana for corporations and nonresident persons to include:

- (1) income from real or tangible personal property located in this state;
- (2) income from doing business in this state;
- (3) income from a trade or profession conducted in this state;
- (4) compensation for labor or services rendered within this state; and
- (5) income from stocks, bonds, notes, bank deposits, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other intangible personal property to the extent that the income is apportioned to Indiana under this section or if the income is allocated to Indiana or considered to

be derived from sources within Indiana under this section.

When a corporation derives business income from sources both within and without Indiana, the business income derived from sources within Indiana is determined by an apportionment formula. [IC 6-3-2-2\(b\)](#).

As for the issue of corporate income tax nexus, IC § 6-3-2-2(e) and (f) states:

(e) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the taxable year, and the denominator of which is the total sales of the taxpayer everywhere during the taxable year. Sales include receipts from intangible property and receipts from the sale or exchange of intangible property. However, with respect to a foreign corporation, the denominator does not include sales made in a place that is outside the United States. Receipts from intangible personal property are derived from sources within Indiana if the receipts from the intangible personal property are attributable to Indiana under section 2.2 of this chapter. Regardless of the f.o.b. point or other conditions of the sale, sales of tangible personal property are in this state if:

- (1) the property is delivered or shipped to a purchaser that is within Indiana, other than the United States government; or
- (2) the property is shipped from an office, a store, a warehouse, a factory, or other place of storage in this state and the purchaser is the United States government.

Gross receipts derived from commercial printing as described in [IC 6-2.5-1-10](#) and from the sale of computer software shall be treated as sales of tangible personal property for purposes of this chapter.

(f) Sales, other than receipts from intangible property covered by subsection (e) and sales of tangible personal property, are in this state if:

- (1) the income-producing activity is performed in this state; or
- (2) the income-producing activity is performed both within and without this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

The Department's regulation found at [45 IAC 3.1-1-38](#) further provides:

For apportionment purposes, a taxpayer is "doing business" in a state if it operates a business enterprise or activity in such state including, but not limited to:

- (1) Maintenance of an office or other place of business in the state[;]
- (2) Maintenance of an inventory of merchandise or material for sale distribution, or manufacture, or consigned goods[;]
- (3) Sale or distribution of merchandise to customers in the state directly from company-owned or operated vehicles where title to the goods passes at the time of sale or distribution[;]
- (4) Rendering services to customers in the state[;]
- (5) Ownership, rental or operation of a business or of property (real or personal) in the state[;]
- (6) Acceptance of orders in the state[; or]
- (7) Any other act in such state which exceeds the mere solicitation of orders so as to give the state nexus under P.L. 86-272 to tax its net income.

As stated in Regulation 6-3-2-2(b)(010) [[45 IAC 3.1-1-37](#)], corporations doing business in Indiana as well as other states are subject to the allocation and apportionment provisions of [IC 6-3-2-2\(b\)-\(n\)](#).

The Department's guidance on this issue is also found in Income Tax Information Bulletin #12, which provides in relevant part:

For Indiana adjusted gross income tax purposes, the term doing business generally means the operation of any business enterprise or activity in Indiana including but not limited to the following:

- Maintenance of an office, a warehouse, a construction site, or another place of business in Indiana.
- Maintenance of an inventory of merchandise or material for sale, distribution, or manufacture.
- The sale or distribution of merchandise to customers in Indiana directly from company- owned or -operated vehicles when the title of merchandise is transferred from the seller or distributor to the customer at the time of sale or distribution.
- The rendering of a service to customers in Indiana.
- The ownership, rental, or operation of business or property (real or personal) in Indiana.
- Acceptance of orders in Indiana with no right of approval or rejection in another state.
- Interstate transportation.
- Maintenance of a public utility.

Of relevance here is 15 USC § 381 (P.L. 86-272), which prohibits states from imposing a net income tax on a foreign taxpayer if the foreign taxpayer's only business activity within that state is the solicitation of sales. As such, a state may not impose an income tax on income derived from business activities within that state if those activities do not exceed the mere solicitation of sales.

By way of further explanation, the U.S. Supreme Court established that a de minimus [*sic*] amount of non-solicitation activity also would not cause a corporation to lose the exemption from taxation afforded by P.L. 86-272. Wisconsin Dept. of Revenue v. William Wrigley, Jr., 505 U.S. 214, 228-29, 112 S.Ct. 2447, 2456-57 (1992). However, the Court stated that a company would lose the protection of P.L. 86-272 if it performs an activity that establishes a nontrivial additional connection with the taxing state. Id. at 231-32.

The provisions outlined in regulation [45 IAC 3.1-1-38](#) constitute a minimum threshold of activity in which an entity must engage to establish nexus with the state such that taxation would not be prohibited under P.L. 86-272. Based upon the information provided and the Department's understanding of this information, Taxpayer's activity does reach that threshold, because although they do not solicit sales in Indiana, they maintain an office, they own or rent property, and the acts performed by the employee in submitting drawings to the FAA constitute doing business in this state. Therefore, Taxpayer has nexus in Indiana for corporate income tax purposes, and income derived from Indiana sources within the meaning of [IC 6-3-2-2](#) must be included in Taxpayer's Indiana corporate income tax returns.

As for the issue of nexus for Indiana sales and use tax registration purposes, Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. [IC 6-2.5-2-1\(a\)](#). Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." [IC 6-2.5-3-2\(a\)](#).

[IC 6-2.5-4-1](#) provides in pertinent part:

- (a) A person is a retail merchant making a retail transaction when the person engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of the person's regularly conducted trade or business, the person:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
 - (1) the property is transferred in the same form as when it was acquired;
 - (2) the property is transferred alone or in conjunction with other property or services; or
 - (3) the property is transferred conditionally or otherwise.

[IC 6-2.5-3-6](#) provides in pertinent part:

- (b) The person who uses, stores, or consumes the tangible personal property acquired in a retail transaction is personally liable for the use tax.
- (c) The person liable for the use tax shall pay the tax to the retail merchant from whom the person acquired the property, and the retail merchant shall collect the tax as an agent for the state, if the retail merchant is engaged in business in Indiana or if the retail merchant has departmental permission to collect the tax. In all other cases, the person shall pay the use tax to the department.

[IC 6-2.5-3-1\(c\)](#) provides:

"A retail merchant engaged in business in Indiana" includes any retail merchant who makes retail transactions in which a person acquires personal property or services for use, storage, or consumption in Indiana and who:

- (1) maintains an office, place of distribution, sales location, sample location, warehouse, storage place, or other place of business which is located in Indiana and which the retail merchant maintains, occupies, or uses, either permanently or temporarily, either directly or indirectly, and either by the retail merchant or through a representative, agent, or subsidiary;
- (2) maintains a representative, agent, salesman, canvasser, or solicitor who, while operating in Indiana under the authority of and on behalf of the retail merchant or a subsidiary of the retail merchant, sells, delivers, installs, repairs, assembles, sets up, accepts returns of, bills, invoices, or takes orders for sales of tangible personal property or services to be used, stored, or consumed in Indiana;
- (3) is otherwise required to register as a retail merchant under [IC 6-2.5-8-1](#); or

(4) may be required by the state to collect tax under this article to the extent allowed under the Constitution of the United States and federal law.

[45 IAC 2.2-3-3](#) further explains:

A retail merchant engaged in business in Indiana shall include:

- (1) Any retail merchant engaged in selling at retail for use, storage, or consumption in Indiana and maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, and office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business in Indiana.
- (2) Any retail merchant engaged in selling at retail for use, storage, or consumption in Indiana and having any representative, agent, salesman, canvasser or solicitor operating in Indiana under the authority of the retail merchant or its subsidiary for the purpose of selling, delivering, or taking orders for the sale of any tangible personal property for use, storage, or consumption in Indiana.

The Department's Sales Tax Information Bulletin #37 provides the following guidance regarding out-of-state vendors:

An out-of-state vendor is engaged in business in Indiana and must be registered as an Indiana Retail Merchant and charge Indiana Use Tax on tangible personal property delivered into Indiana if the out-of-state vendor:

- a. maintains an administrative office in Indiana;
- b. maintains a research facility in Indiana;
- c. displays merchandise at local trade fairs and exhibitions in Indiana;
- d. maintains a factory or warehouse in Indiana; or
- e. delivers goods into Indiana by the seller's truck where title and possession transfer in Indiana.

...

An out-of-state vendor is NOT engaged in business in Indiana and therefore is NOT required to register as an Indiana Retail Merchant and charge Indiana Use Tax on tangible personal property delivered in Indiana where the out-of-state vendor's ONLY Indiana activity is any of the following:

1. owning Indiana realty for investment;
2. being "qualified" to do business in Indiana;
3. purchasing goods in Indiana;
4. conducting credit investigations;
5. delivering goods by common carrier or parcel post;
6. being closely related to another person that maintains a place of business in Indiana.

Because Taxpayer has a physical "place of business" in Indiana, Taxpayer has substantial nexus for sales and use tax purposes, and must register as an Indiana Retail Merchant.

Taxpayer makes reference to a recent Indiana law that it believes would exempt Taxpayer's sales of airplane parts. Taxpayer most likely refers to [IC 6-2.5-5-46](#), which provides:

(a) Transactions involving tangible personal property (including materials, parts, equipment, and engines) are exempt from the state gross retail tax, if the property is:

- (1) used;
- (2) consumed; or
- (3) installed;

in furtherance of, or in, the repair, maintenance, refurbishment, remodeling, or remanufacturing of an aircraft or an avionics system of an aircraft.

(b) The exemption provided by this section applies to a transaction only if:

- (1) the retail merchant, at the time of the transaction, possesses a valid repair station certificate issued by the Federal Aviation Administration under 14 CFR 145 et seq. or other applicable law or regulation; or
- (2) the:
 - (A) retail merchant has leased a facility at a public use airport for the maintenance of aircraft and meets the public use airport owner's minimum standards for an aircraft maintenance facility; and
 - (B) work is performed by a mechanic who is certified by the Federal Aviation Administration.

(c) The owner of a public use airport shall annually provide to the department the names of retail merchants that have a lease with the public use airport and that perform aircraft maintenance at the public use airport.

Taxpayer does not mention whether Taxpayer possesses a valid repair station certificate issued by the Federal

Aviation Administration, or whether Taxpayer has leased a facility at a public use airport for the maintenance of aircraft and meets the public use airport owner's minimum standards for an aircraft maintenance facility. It appears that Taxpayer manufactures airplane parts but does not repair aircraft. Therefore, [IC 6-2.5-5-46](#) would not apply.

As such, once Taxpayer registers as an Indiana Retail Merchant, Taxpayer must collect sales tax from its Indiana customers when it sells and delivers products to Indiana, unless the purchaser presents a valid exemption certificate that qualifies the purchaser for a different sales tax exemption. Taxpayer's airline parts may be exempt under the public transportation exemption found in [IC 6-2.5-5-27](#).

RULINGS

- I. Taxpayer has nexus in Indiana for Indiana adjusted gross income tax purposes, and income derived from Indiana sources within the meaning of [IC 6-3-2-2](#) must be included in Taxpayer's Indiana corporate income tax returns.
- II. Taxpayer has substantial nexus in Indiana for gross retail tax and use tax purposes. Therefore, Taxpayer must register as an Indiana Retail Merchant, and collect Indiana sales tax from its Indiana customers when it sells and delivers products to Indiana, unless the purchaser presents a valid exemption certificate.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

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